BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN R. KARR Claimant	)	
V.	)	
MID CENTRAL CONTRACTORS Respondent	)	Docket No. 1,061,671
AND	)	
EMPLOYERS MUTUAL CASUALTY CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 29, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 17, 2015. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Ryan Weltz of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant sustained a 9 percent functional impairment to the body as a whole by averaging two rating opinions. The ALJ ordered work disability at the rate of 49.5 percent from November 13, 2013, until November 29, 2013, and at the rate of 50 percent beginning November 30, 2013.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant has, at most, a 5 percent whole body functional impairment because the ALJ erred in giving equal weight to the two rating opinions, derived from two different methodologies. Respondent maintains claimant is not eligible for work disability benefits pursuant to K.S.A. 2011 Supp. 44-510e. Further, respondent argues claimant is capable of working in the open labor market and has no task loss.

Claimant contends the ALJ's Award should be affirmed. Alternatively, should the Board modify claimant's functional impairment, claimant argues he has proven a 13 percent permanent partial impairment to the body as a whole.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?

2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Respondent is a construction company that provides new construction and maintenance for utility companies. Respondent has an office in Pittsburg, Kansas, where claimant was hired. On July 7, 2011, while working on a site east of Miami, Oklahoma, claimant was struck by a post hole driver when it fell from a skid loader. Claimant stated the post hole driver knocked him to the ground and landed on his shoulder and back. Claimant was unable to move after the accident. Claimant was transported by ambulance to Freeman Hospital in Joplin, Missouri, where he was treated and evaluated. Claimant was given medication and told to follow up with occupational health services. Claimant eventually returned to work for respondent in an accommodated position.

Claimant began treatment with Dr. Dennis Estep, a board certified occupational health physician, on July 11, 2011. Dr. Estep initially diagnosed lumbar contusion, pelvic contusion, and lumbosacral sprain. On August 30, 2011, claimant underwent an MRI, which revealed chronic degenerative disk disease at L5-S1 and mild facet effusions with no indication of fractures or a herniated disk. Dr. Estep testified claimant was not a surgical candidate and instead treated claimant conservatively, providing medication and a referral to physical therapy. Dr. Estep placed claimant on restricted duty and eventually referred him to Dr. Sadie Holland for pain management in December 2012.

Claimant testified Dr. Holland provided sacroiliac joint injections, which provided no relief. Claimant continued to complain of pain in his right low back into his right hip. Dr. Holland eventually released him from her care. Dr. Estep determined claimant to be at maximum medical improvement on March 5, 2013, and released claimant from his care. Dr. Estep testified:

> [Claimant] had returned back after seeing Dr. [Holland], who is pain management, and she had noted that he – she had nothing further to offer. He had been doing normal activity in the workplace, working rebar, setting stands, and actually doing

> much better doing this than driving a truck, and recommended he be placed on no specific limitation and placed at max improvement.[1]

Using the AMA *Guides*,[2] Dr. Estep determined claimant sustained a 5 percent permanent impairment to the body as a whole. Dr. Estep testified he used the DRE Method of the AMA *Guides* because it is the preferred method. In a report dated April 2, 2013, Dr. Estep wrote:

> A lumbosacral impairment Table 72, Page 110 with a clinical injury without radiculopathy or verifiable loss of motion is equal to 5% impairment to the whole person.[3]

During his deposition, Dr. Estep agreed the AMA *Guides* indicate:

> The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70, page 108. The model would be applicable to a patient with a herniated lumbar spine or evidence of nerve root irritation. If none of the categories of the injury model is applicable, then the evaluator should use range of motion.[4]

Dr. Estep agreed none of the descriptors in Table 70 described claimant. However, Dr. Estep stated he found claimant to fit DRE Category II based on Table 72. He testified:

> Q. Okay. You found [claimant] to be in Category II for Table 72. True?
>
> A. Correct.
>
> Q. Does that correspond with any of the Patient Conditions that are identified in Table 70?
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> A. Well, [claimant] had no fracture, and he had no vertebral compressions, and he had no spinous process fractures. He has no – spondylosis is – when they're talking about paraplegic, spondylosis is degenerative changes without loss of motion or segment integrity or radiculopathy.
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> Q. According to Table 70, that would carry a [DRE Category] I or a II?

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[1] Estep Depo. at 9-10.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Estep Depo., Ex. 2 at 5.

[4] Estep Depo. at 18-19; see also Ex. 5 at 1.

A. Yes.

Q. Does that correspond with his condition?

A. Yes. Spondylosis is oftentimes also translated as degenerative changes.[5]

Dr. Estep determined claimant needed no restrictions and required no additional medical treatment at that time. Dr. Estep agreed that if claimant could no longer perform his work activities, claimant should be tested to determine work restrictions and/or additional medical treatment.

In a letter dated November 26, 2013, Dr. Estep indicated it was more reasonable for claimant to take over-the-counter ibuprofen instead of prescription medication. He wrote, "It is also noted that [claimant] did express the desire not to be on pain medication but did request to continue on his ibuprofen of which he states helps with his underlying degenerative disk disease."[6] Claimant disputed Dr. Estep's statement, testifying Dr. Estep stated "he didn't believe in painkillers" and directed claimant to take over-the-counter ibuprofen.[7] Claimant denied telling Dr. Estep he only wanted over-the-counter medication.

Dr. Edward Prostic, a board certified orthopedic surgeon, first examined claimant on September 21, 2012, at claimant's counsel's request. Claimant complained of low back and chest pain. Dr. Prostic reviewed claimant's medical records, history, performed a physical examination, and took x-rays of claimant's left rib and lumbar spine. Dr. Prostic concluded claimant sustained injury to the costochondral cartilages and to the lumbar spine as a result of the July 2011 work-related accident. He recommended claimant undergo further conservative treatment.

Claimant returned to Dr. Prostic on May 10, 2013, again at his counsel's request. Claimant complained of frequent pain in the right low back and soreness about the front of the right thigh, worsened by most activities. Dr. Prostic reviewed claimant's updated medical records and performed a physical examination. Dr. Prostic concluded claimant sustained injuries to his chest, low back, and sacroiliac joint as a result of the July 7, 2011, accident. Dr. Prostic opined claimant's work-related incident and resulting injuries were the prevailing factor causing claimant's injury, medical condition, need for medical treatment, and the resulting disability and impairment.

Using the AMA *Guides*, Dr. Prostic concluded claimant sustained a 13 percent permanent partial impairment of the body as a whole on a functional basis. Dr. Prostic

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[5] *Id*. at 30-31.

[6] *Id*., Ex. 2 at 1.

[7] Claimant's Depo. at 24.

used the Range of Motion Model in forming his opinion because he did not think the DRE Model adequately described claimant's condition, including some preexisting problems in claimant's low back. Dr. Prostic explained:

> Q. Why is it that the DRE would not accurately describe the impairment?
>
> A. Well, the instructions in the Guides on page 99 is to use the Range of Motion Model to confirm the DRE, and if the Range of Motion Model and the DRE disagreed significantly, pick the DRE closest to the Range of Motion Model. Well, I thought that the fact that it didn't describe the [sacroiliac] joint injury and because he had 11 percent just for range of motion, not including the degenerative disk disease, I thought 5 percent for sprain and strain was not sufficient.[8]

Dr. Prostic agreed, if confined to the DRE Model, that claimant would be in DRE Lumbosacral Category II with a corresponding 5 percent impairment. Dr. Prostic testified, "If you twisted my arm behind my back and said that's all I can use, then I agree, but I still need something different for the [sacroiliac] joint . . . ."[9] Dr. Prostic opined claimant would need additional conservative medical treatment and restricted him to medium-level employment.

Claimant returned to work at respondent shortly after his July 7, 2011, accident in an accommodated position, sweeping and cleaning the shop. After approximately three weeks, claimant returned to the construction crew running the skid loader, a lighter position. Claimant stated he informed respondent he had problems running the skid loader and was transferred to driving a dump truck. Operating the dump truck bothered claimant's back, so he again informed respondent and was moved to a substation position. Claimant explained he tied rebar in this position, and he was required to bend over throughout the day. Claimant told respondent this position continued to aggravate his back pain. Claimant was eventually laid off on November 11, 2013, under the impression respondent had no work available for him. Claimant testified he believed he was let go because of his work injury. He was not provided documentation regarding his termination.

Claimant drew unemployment benefits from the State of Missouri for five months following his termination. Claimant agreed he certified on the application he was ready, willing, and able to work. He has not worked since November 11, 2013, though he stated he applied for various jobs on multiple occasions. Claimant indicated he was unsure of the extent of his current physical capabilities and did not know which jobs he could perform.

Karen Terrill, a vocational rehabilitation expert, interviewed claimant on June 2, 2014, at claimant's counsel's request. Ms. Terrill reviewed claimant's educational

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[8] Prostic Depo. at 26-27.

[9] *Id*. at 27.

background and his 5-year work history prior to the work-related accident of July 2011. Claimant was a 54-year old high school graduate at the time of the interview, and Ms. Terrill determined he had no transferable job skills. Ms. Terrill identified two jobs within Dr. Prostic's restrictions. The two jobs, which she stated were available in claimant's labor market, are package handler and assembler/fabricator. The identified jobs pay from $325.20 to $330.00 per week, the average of which is $327.60. Ms. Terrill noted the jobs were generally entry-level positions and would represent a 56 percent loss of wage-earning capabilities for claimant.[10]

Dr. Prostic reviewed the task list prepared by Ms. Terrill dated June 4, 2014. Of the 10 unduplicated tasks on the list, Dr. Prostic opined claimant could no longer perform 5, for a 50 percent task loss.

Michelle Sprecker, a certified vocational rehabilitation counselor, interviewed claimant by telephone at respondent's request on June 24, 2014. Ms. Sprecker reviewed claimant's 5-year work history and the medical records of Drs. Estep and Prostic. Utilizing Dr. Prostic's restrictions, Ms. Sprecker identified five medium-level jobs claimant is capable of performing, including janitor or custodian, route salesperson, shipping/receiving clerk, forklift operator, and truck driver.[11] The average weekly earnings of these five positions is $517.04. The only jobs Ms. Sprecker identified as being available in claimant's labor market were two custodian positions and one truck driver position.

Regarding Dr. Estep's opinion of no work restrictions, Ms. Sprecker testified:

> I said that if [claimant] were unable to return to work at his previous position with his pre-injury employer, based on the Kansas Wage Survey the experience wage for construction labor types of jobs in [claimant's area] would result in an 18.4 percent wage loss.[12]

Dr. Estep reviewed the task list generated by Ms. Sprecker on July 14, 2014. Of the 11 unduplicated tasks on the list, Dr. Estep opined claimant could perform all tasks, for a 0 percent task loss.

Claimant testified he continues to suffer pain and takes prescription pain medication prescribed by Dr. David Huerter, an internal medicine physician. Claimant has treated with Dr. Huerter since September 2013.

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[10] The percentage was based on claimant's stipulated average weekly wage, not including fringe benefits. See Terrill Depo. at 17-19.

[11] See Sprecker Depo. at 11-12.

[12] *Id*. at 22-23.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510e(a) states:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

> (I) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
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> (ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or
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> (iii) the loss of or loss of use of both eyes.

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 ½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
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> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

> (i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage

> loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.
>
> (ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.
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> (iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

. . .

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

K.S.A. 2011 Supp. 44-510h(e) states, in relevant part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term “medical treatment” as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

ANALYSIS

1. What is the nature and extent of claimant's disability?

a. Functional Impairment

The Board agrees with the ALJ's conclusion that the functional impairments provided by Drs. Estep and Prostic are equally credible. Claimant suffers a 9 percent functional impairment to the body as a whole based on an average of the two rating opinions.

b. Work Disability

The ALJ adopted Dr. Prostic's assessment of a 50 percent task loss. The Board agrees. Dr. Prostic's June 2, 2014, report containing his opinion that claimant is able to return to medium-level employment was placed into the record without objection by respondent.[13] The opinions contained in the report were not controverted on cross-examination.

The only evidence controverting Dr. Prostic's opinion that claimant is limited to medium-level employment is contained in the testimony and report of Dr. Estep. While Dr. Estep opined claimant was capable of returning to work without restrictions and suffered no task loss, the Board gives this opinion little weight. Dr. Estep testified claimant's full duty release was based on his understanding claimant had returned to full duty. Dr. Estep testified if claimant would have returned to him and told him he could not do the work, he would have sent claimant for testing to determine permanent restrictions. This was not done. Dr. Estep's opinion that claimant suffers no task loss is based upon incomplete or inaccurate information. The Board finds the greater weight should be given to Dr. Prostic's task loss opinion, and it is more probable than not claimant experiences a 50 percent task loss resulting from his work-related injury.

In arriving at her opinion regarding claimant's wage loss, Michelle Sprecker identified five jobs claimant could perform, earning between $394.14 and $639.27 per week, the average of which is $517.04 per week. The ALJ included only three of the jobs identified by Ms. Sprecker in his calculations. The ALJ presumably did not include all five jobs listed in Ms. Sprecker's report because they were not available in claimant's labor market. Ms. Sprecker wrote claimant could earn $545.59 per week operating a forklift. However, she could not identify any forklift operator jobs in claimant's labor market. She wrote claimant could earn $482.86 per week as a shipping/receiving clerk. Again, she could not say if there were any shipping/receiving clerk jobs in claimant's labor market. Ms. Sprecker wrote claimant could earn $523.35 per week as a route salesman. However, she

[13] Prostic Depo. at 24.

testified she could not identify any route salesman jobs available in claimant's labor market.

Ms. Sprecker identified three jobs that were within claimant's restrictions and available in claimant's labor market. Ms. Sprecker found a custodian job with Labette County, USD 506, earning $10.13 per hour, a machine shop janitor position with Labor Max Staffing earning $8.50 per hour, and a truck driver position with Service Recycling earning $10.00 per hour. The average of these hourly rates, as noted by the ALJ, is $9.54 per hour. Multiplied by 40 hours, the weekly rate is $381.60. The jobs utilized in the ALJ's calculations were identified in Ms. Sprecker's report as being available in claimant's labor market.[14] The Board agrees with the ALJ's decision not to accept all of Ms. Sprecker's opinions relating to claimant's wage-earning capacity. The Board finds claimant can earn $381.60 per week in the open labor market based upon the opinion of Ms. Sprecker.

The other vocational expert, Karen Terrill, concluded claimant could find employment earning from $325.20 to $330.00 per week, the average of which is $327.60. Ms. Terrill opined claimant could find work as a packager or an assembler and fabricator. The Board finds it significant Ms. Terrill testified the jobs identified were available in claimant's labor market.[15] Averaging the two jobs identified by Ms. Terrill, the Board finds claimant is capable of earning $327.60 per week. Averaging the findings of the two vocational experts, claimant is capable of earning $354.60 per week.

The ALJ's calculations regarding claimant's wage loss are in error. Pursuant to stipulation by the parties, claimant's average weekly wage from July 7, 2011, through November 29, 2013, was $737.85. Based upon a post-injury wage-earning capacity of $354.60, claimant's wage loss for this period is 52 percent. Combined with a task loss of 50 percent, claimant suffers a work disability of 51 percent. Pursuant to stipulation by the parties, claimant's average weekly wage beginning November 30, 2013, was $765.76. Based upon a post-injury wage-earning capacity of $354.60, claimant's wage loss for this period is 54 percent. Combined with a task loss of 50 percent, claimant suffers a work disability of 52 percent.

2. Is claimant entitled to future medical treatment?

Claimant testified he continues to have constant pain in his low back, right hip and right thigh. Claimant also testified his personal physician, Dr. Huerter, continues to prescribe Tramadol for his pain. Dr. Estep agreed if claimant could not continue to perform his job, he would need to examine claimant to determine the need for medical care. Dr. Prostic testified claimant would need medicines, possible physical therapy and future

[14] Sprecker Depo., Ex. 2, pgs. 8-9.

[15] See Terrill Depo. at 18.

injections, and ongoing evaluation by a physician. Claimant is entitled to future medical treatment.

CONCLUSION

Claimant is entitled to a 51 percent work disability from November 11, 2013, the date claimant was laid off, through November 29, 2013, and a 52 percent work disability thereafter. Claimant is entitled to future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 29, 2014, is affirmed, in part, and modified, in part, to reflect a 9 percent functional impairment from July 7, 2011, through April 20, 2012, a 51 percent work disability beginning November 11, 2013, through November 29, 2013, and a 52 percent work disability beginning November 30, 2012.

Claimant is entitled to 37.35 weeks of permanent partial whole body functional disability at the rate of $491.92 per week, totaling $18,373.21 for a 9 percent whole body functional impairment, followed by 2.71 weeks permanent partial general disability at the rate of $491.92 per week, totaling $1,333.10 for a 51 percent work disability, followed by 175.74 weeks permanent partial general disability at the rate of $510.53 per week, totaling $89,720.54 for a 52 percent permanent partial general disability, resulting in a total award of $109,426.85.

As of April 15, 2015, there would be due and owing to the claimant 40.06 weeks of permanent partial disability compensation at the rate of $491.92 per week in the sum of $19,706.32, plus 71.72 weeks of permanent partial disability compensation at the rate of $510.53 per week in the sum of $36,615.21 for a total due and owing of $56,321.53, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $53,105.32 shall be paid at the rate of $510.53 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge